PUBLIC PROSECUTOR

v.

LOW AH CHENG

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[CRIMINAL APPEAL NO. 41-80-90]
10 AUGUST 1993

CRIMINAL PROCEDURE: Charge - Charge of using house as a gaming place - Common Gaming House Act 1953 - Section 4(1)(b) thereof preferred for charge - Whether proper - Whether charge to be under s. 4(1)(a).

CRIMINAL PROCEDURE: Charge of using house as a gaming place - Plea of guilty - Conviction - Ingredient of public access to house not explained to accused - Whether conviction thereof proper.

The respondent pleaded guilty to a charge under s. 4(1)(b) Common Gaming House Act 1953 for "using her house" as a gaming place and was convicted and sentenced by the Magistrate to a fine of RM2500 in default eight months imprisonment. The respondent paid the fine but the Public Prosecutor, being dissatisfied with the sentence, appealed against the same. The learned Judge, on perusing through the notes, discovered some improprieties in respect of the preferred charge and the conviction thereof, and hence proceeded instead to deliberate on the question of whether to set aside the conviction and sentence hereof by way of revision.

Held:

[1] The respondent having been charged with using the house as a common gaming house, as against permitting it to be so kept or used, should have been charged under s. 4(1)(a) and not s. 4(1)(b) of the Act.

[2] The illegality of using the house as alleged would only have arisen if the ingredient of public access was in existence. On the facts it would appear that the Magistrate had failed to apply his mind to the existence or otherwise of this ingredient. Nowhere in the statement of facts is there any reference to the public having had access to the house and thus if the Magistrate did have in mind this ingredient he would in all probability have refused to accept the respondent's plea of guilty. Even if he did so he certainly failed to draw the necessity of its existence to the respondent's attention, as he should have, before accepting the plea of guilty.

[3] Before the Court records a plea of guilty by the accused it should satisfy itself by questioning the accused that he really does understand the charge and admits each ingredient that goes to make it. This is what the Magistrate should have done in this case, particularly so as the public element involved was of a technical matter and the respondent was only appearing in person.

[4] The evidence pointed to a family game of cards with no question of public access to the house. Accordingly, rather than give consideration to a question of inadequacy of sentence, by recourse to the revisionary powers envisaged in s. 325 CPC, the conviction and sentence herein is set aside and the respondent is acquitted and discharged of the offence.

[Respondent acquitted and discharged].

Cases referred to:
R. v. Fong Chong Cheng [1930] SSLR 139 ***(foll)***
Cheng Ah Sang v. Public Prosecutor [1948] MLJ 82 ***(foll)***
Public Prosecutor v. Yusoff [1964] MLJ 264 ***(foll)***

Legislation referred to:
Common Gaming House Act 1953, s. 2, 4(1)(a), (b)

For the appellant - Azmi Ariffin, DPP
For the respondent - K.H. Tan; M/s. Soh Yok Lam & Co.

JUDGMENT

Richard Talalla J:

The respondent was charged in the Magistrate's Court at Muar that she did on 15 November, 1983 at about 4.45 p.m. at house No. TS-37, Jalan Jabbar, Pt. Jawa, Muar (the house) as the owner of the house, use the house as a gaming place where the public have access and that she did thereby commit an offence punishable under s. 4(1)(b) Common Gaming House Act 1953 as amended (the Act).

The respondent pleaded guilty to the charge. The prosecuting officer then gave the facts of the case which were to the effect that at the date, time and place contained in the charge a police team led by an Inspector carried out a raid on the house, arrested four Chinese persons, one male and three female including the respondent and seized RM158 in cash, 112 playing cards, a table and 4 chairs, that an investigation was carried out resulting in the respondent acknowledging that the house was

hers and it appearing that the house was used as a place for gambling and that the cards having been sent to a gambling expert, the expert certified that the cards were used to play the game of gin rummy. A police report was produced. The respondent admitted the facts whereupon she was convicted and sentenced to a fine of RM2,500 in default 8 months imprisonment. The fine was paid.

The Public Prosecutor was not satisfied with the sentence which he considered to be inadequate and accordingly appealed against the same to this Court.

Section 4(1)(b) of the Act being section under which the respondent was charged speaks *inter alia* to a place being used as a common gaming house. For the purpose of the offence charged a common gaming house is defined in s. 2 of the Act to include any place kept or used for gaming to which the public or any class of the public has or may have access and any place kept for habitual gaming, whether the public or any class of the public has or may have access to it or not.

It is now well established in our case law that it is not illegal merely to play games of chance for money. See *R. v. Fong Chong Cheng* [1930] SSLR 139. In this instance the illegality would have arisen if the respondent used the house as a common gaming house or permitted it to be so used. Digressing for a moment. The respondent having been charged with using the house as against permitting it to be kept or used should have been charged under s. 4(1)(a) and not (b). The illegality would only have arisen if the ingredient of public access as contained in the abovementioned definition of a common gaming house was in existence. It would appear that the learned Magistrate failed to apply his mind to the existence or otherwise of that ingredient. Even if he did so, he certainly did not draw the necessity of its existence to the respondent's attention as he should have before accepting the plea of guilty. In *Cheng Ah Sang v. Public Prosecutor* [1948] MLJ 82 the accused was charged with keeping or using a house as a common gaming house. It was held by Laville J. that before a Court records a plea of guilty by the accused it should satisfy itself by questioning the accused that he really does understand the charge and admits each ingredient that goes to make it up. That is what the learned Magistrate should have done in this case. The public element involved was of a technical nature. The respondent was not represented by Counsel in the Court below. In this regard Hashim J. in *Public Prosecutor v. Yusoff* [1964] MLJ 264 held that where an accused is not represented by Counsel it is the duty of the trial Magistrate to satisfy himself that the accused understands the technical nature of the charge before accepting his plea. If the learned Magistrate did have in mind the ingredient of public access he would in all probability have refused to accept a plea of guilty from the respondent for nowhere in the statement of facts is there any reference to the public having had access to the house. Again if all the requisite ingredients of the charged were explained to the respondent, in all probability the respondent would not have pleaded guilty. The police report which was produced before the learned Magistrate bore the names of the three persons the respondent was with when the respondent was arrested. By recourse to the revisionary powers contained in s. 325 of the Criminal Procedure Code it was discovered that these three persons were the husband, the husband's aunt by marriage and neighbour respectively of the respondent and this pointed to a friendly, family game of cards with no question of public access to the house. Accordingly rather than give consideration to a question of inadequacy of sentence, by recourse to the revisionary powers stated above the conviction of the respondent and the sentence thereunder was set aside, the respondent was acquitted and discharged of the offence charged and the fine which she had paid was ordered to be returned to her.